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PP

v.

THONG KIAN OON & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
GHAZALI CHA J
[CRIMINAL TRIAL NO: 44-84-2011]
16 FEBRUARY 2012

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CRIMINAL PROCEDURE: *Forfeiture - Forfeiture order - Anti-Money Laundering and Anti-Terrorism Financing Act 2001, s. 56(1) - Forfeiture of properties allegedly proceeds of unlawful activity - Whether respondents involved in illegal public lottery - Whether there was satisfactory proof which offence was relied on for purpose of forfeiture application - Whether offence a serious offence - Whether there was sufficient evidence to link crime committed and property - Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4A(1) - Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 4, 56(1)*

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The Deputy Public Prosecutor ('the applicant') filed this application by way of Notice of Motion for Civil Forfeiture under s. 56(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the Act'). The application was made for an order for forfeiture of, *inter alia*, monies in bank accounts ('the properties') which the applicant contended were used in the commission of the offence under s. 4 of the Act. The respondents were identified as true and lawful owners of the properties. The applicant alleged that the respondents were involved in illegal public lottery and that the properties were proceeds of an unlawful activity under s. 4A(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969. The respondents challenged the application saying that they were not involved in any unlawful activity and that the properties were not the proceeds of the unlawful activity as claimed by the applicant. Further, the respondents submitted that the seizure and freezing of the property was illegal, irrational and a procedural impropriety. In deciding whether learned DPP had discharged the onus resting upon him in the present case, the following issues were considered, *inter alia* (a) on which offence(s) did the application rely on; (ii) whether those offence(s) referred to fell within the Second Schedule of the Act; (iii) whether the properties sought

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to be forfeited a subject matter of a serious offence, as contemplated by the Act; and (iv) whether there was sufficient evidence to link the crime committed and the properties.

Held (dismissing application for forfeiture):

(1) In deciding whether there were satisfying grounds for believing that a forfeiture order may be made against the respondents, it must be borne in mind that the application under s. 56 of the Act requires proper proof of the relevant facts by means of admissible evidence. This court also takes cognizance of the constitutional safeguards provided by art. 13 of the Federal Constitution which reads 'No person shall be deprived of property save in accordance with law.' (para 7)

(2) The court's function under this Act is not merely Ministerial or Executive character. The duty of the court is to be satisfied on the balance of probabilities that the property is the subject matter of the offence under s. 4(1) of the Act. This is a justiciable issue and ought to be resolved based on the evidence adduced by the applicant. This court has the determinative role in the process of evaluating the DPP's application for the forfeiture order. It must be evaluated objectively to see whether the case is one where it is reasonable and proper to make the orders sought. (para 12)

(3) It was not clear from the affidavit of the DPP on which offence(s) the applicant relied for purposes of this forfeiture application. The forfeiture application is a serious matter and the owner stands to lose property because the property was the subject matter of the offence of s. 4(1) of the Act. Thus it demands that the applicant set out clearly the case the owner is called to answer. There was no satisfactory proof from the applicant which offence they were relying on for the purpose of forfeiture application. (para 20)

(4) Illegal public lottery is within the ambit of the Second Schedule but the unlawful activity under s. 4A(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969 is not a serious offence as spelt out in the Second Schedule. The properties which were claimed by the DPP as proceeds of unlawful activity of s. 4A(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969 were not a subject

matter of a serious offence. There was no further sufficient evidence to link the crime committed and the property. The applicant's application therefore could not succeed. (para 22)

(5) The evidence adduced by learned DPP was insufficient to satisfy this court that the properties were the subject matter of or used in the commission of an offence under subsection 4(1) of the Act. As such the application for the forfeiture order must stand dismissed. It follows that the notice under s. 61 of the Act was premature. Section 61 only comes into play when the court makes the order of forfeiture under s. 56 of the Act. All the properties must therefore be released immediately to the respondents respectively. (para 26)

Case(s) referred to:

Arumugam Pillai v. Government of Malaysia [1975] 1 LNS 2 FC ***(refd)***

Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi [1994] 4 CLJ 47 SC ***(foll)***

S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors [1982] 1 LNS 124 FC ***(refd)***

SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC ***(refd)***

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 4(1), 44(1), (5), 55, 56(1), (2), 61

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3, 4A(1)

Federal Constitution, arts. 4(1), 5, 8, 9, 10, 13, 149(1)

For the applicant - Iskandar Shah Ibrahim; DPP
For the respondent - Athimulan; M/s Athimulan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Ghazali Cha J:

[1] On 5 April 2011, the learned Deputy Public Prosecutor (hereinafter called 'the applicant') filed this application by way of Notice of Motion for Civil Forfeiture under s. 56(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act

2001(hereinafter called 'the Act'). The application is made for an order for forfeiture of the following property (hereinafter called 'the properties'). A

(i) the money in the sum of RM27,441 belonging to the 2nd respondent at Block 2, Kompleks Pejabat Kerajaan, Bukit Perdana, Jalan Dato' Onn, 50502 Kuala Lumpur which was seized on 20 May, 2010; B

(ii) the money in the sum of RM126,160.99 in a Saving Account No. 1105002-7881 belonging to the 2nd respondent at Hong Leong Bank Berhad, Cawangan Kangar, Perlis, which was seized and frozen on 6 July 2010; C

(iii) the money in the sum of RM113,356.68 in an account No. 11000011359 belonging to the 3rd respondent at Hong Leong Bank Berhad, Cawangan Kangar, Perlis, which was seized and frozen on 6 July 2010; D

(iv) the money in the sum of RM69,301.94 in a current account No. 11000004098 belonging to the 3rd respondent at Hong Leong Bank Berhad, Cawangan Kangar, Perlis, which was seized and frozen on 6 July 2010; E

(v) the money in the sum of RM28,967.50 in a junior saving account No. 11050022068 belonging to the 3rd respondent at Hong Leong Bank Berhad, Cawangan Kangar, Perlis, which was seized and frozen on 6 July 2010; F

(vi) the money in the sum of RM11,694.46 in a savelink account No. 6001441225 belonging to the 3rd respondent at Public Bank Berhad, Cawangan Kangar, Perlis, which was seized and frozen on 6 July 2010; G

(vii) the money in the sum of RM6,839.66 in a current account No. 11001006284 belonging to the 4th respondent at Hong Leong Bank Berhad, Cawangan Kangar, Perlis, which was seized and frozen on 6 July 2010; H

(viii) the money in the sum of RM3,549.58 in a current account No. 09030000-60052 at CIMB Bank Berhad, Cawangan Kangar, Perlis, belonging to the 4th respondent, which was seized and frozen on 6 July 2010. I

A (ix) the money in the sum of RM179,988.50 in a Mortgage Plus HL CA account No. 11000011548 belonging to the 5th respondent at Hong Leong Bank Berhad, which was seized and frozen on 31 March 2011;

B (x) a Maybank Berhad Bankers' Cheque dated 31 March 2011 bearing the number 121882 for the sum of RM5,000, which was seized on 31 March 2011;

(xi) a CIMB Bankers' Cheque dated 15 March 2011 bearing the number 675957 for the sum of RM8,000, which was C seized on 16 March 2011; and

(xii) a EON Bankers' Cheque dated 30 March 2011 bearing the number 812797 for the sum of RM3,000, which was seized on 31 March 2011.

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[2] The applicant's case was founded on the affidavits of the learned Deputy Public Prosecutor (DPP), Mohd. Khairuddin bin Idris affirmed on 5 April 2011 (hereinafter called DPP Khairuddin's affidavit); the affidavit of the Chief Inspector Muhammad Nazif bin E Wahab (called Nazif's affidavit) and the affidavit of Inspector Syamsul Qamar bin Wahiruddin (called Syamsul's affidavit). These three affidavits (encl. 3) and the notice of motion (encl. 2) were filed on 5 April 2011.

F **Background**

[3] The properties were seized from the respondents. The five respondents were identified as true and lawful owners of the properties. The applicant's affidavits confirm this fact. Except for the first two respondents, the other respondents were not arrested G for any offence under the Act. None of them were arrested for any predicate offence. No one is charged for any predicate offence. There is no prosecution launched against any of the respondents. The first two respondents were arrested under s. 3 of the Emergency (Public Order and Prevention of Crime) H Ordinance 1969 and were subsequently restricted under s. 4A(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969.

[4] The notice of motion and the three affidavits were served on I the respondents. All the respondents, except the first respondent, filed affidavits in reply to oppose the application for forfeiture. The

applicant in this matter seeks a forfeiture order against the respondents (owners of the properties), which the applicant contends that the properties were the subject matter or were used in the commission of the offence under s. 4 of the Act. The applicant alleges that the respondents have been involved in illegal public lottery and also the properties were proceeds of an unlawful activity under s. 4A(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The respondents in their affidavits in reply challenged the applicant saying that they were not involved in any unlawful activity and that the properties are not the proceeds of the unlawful activity as claimed by the applicant. However, in deciding the present application it is necessary for me to refer briefly to the statutory framework.

Statutory Framework

[5] The Act as a whole is a response to a perceived growth in organised and related criminal activities of money laundering and terrorism financing offences. In this regard, the Act is in line with the international trends as it encompasses not only criminal forfeiture but also the relatively new concept to our country of civil forfeiture. The Act provides for the forfeiture of terrorist property and property involved in, or divided from money laundering and terrorism, financing offences, and for matters incidental thereto and connected therewith.

[6] The present application involves part VI of the Act. This part of the Act provides provisions for freezing, seizure and forfeiture of the property. Section 56 of the Act provides for 'civil forfeiture', as opposed to 'criminal forfeiture', which in turn, regulated by s. 55 of the Act. Section 56 of the Act may be involved even when there is no prosecution of any individual. By s. 56 of the Act, learned DPP is empowered to apply to a judge of the High Court for an order forfeiting to the state all the property that has been seized and frozen pursuant to this provision of part vi of the Act. This mechanism of forfeiture may only be invoked by order of the High Court.

[7] In deciding whether there are satisfying grounds for believing that a forfeiture order may be made against the respondents, it must be borne in mind that an application under s. 56 of the Act requires proper proof of the relevant facts by means of admissible evidence. This court also takes cognizance of the constitutional

A safeguards provided by art. 13 of the Federal Constitution which reads, "No person shall be deprived of property save in accordance with law".

[8] The Act was not enacted pursuant to art. 149(1) of the
B Federal Constitution and therefore the constitutional guarantees enshrined in arts. 5, 8, 9, 10 and 13 cannot be infringed at all. Therefore the freezing, seizure and the forfeiture of the property must be carried out according to the law. The enforcement agency must carry out their powers lawfully and not arbitrarily. In this
C connection, I need only recall the words of Justice Hashim Yeop A Sani (as he then was) in the case of *S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors* [1982] 1 LNS 124; [1982] 1 MLJ 204 at p. 206, right hand column, para. F, which reads:

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> Article 13(1) in my opinion ensures the sanctity of private property. That clause guarantees the right of any person not to be deprived of his property save in accordance with the law which simply means that no one can be deprived of his property merely on the orders of the Executive but that he **may be deprived of**
E **his property only with accordance in law**. (emphasis added).

[9] Since the provisions of the Act are penal and are designed to take away existing legal rights to property, it requires the provisions of the law are strictly adhered to s. 56 of the Act.

F **[10]** For ease of reference, I produce relevant provisions of the Act in this, namely s. 56 and s. 61.

They read:

G **56. Forfeiture of property where there is no prosecution**

> (1) Subject to s. 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of
H twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

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(2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied:

(a) that the property is the subject matter of or was used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

(4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

[11] The mechanism of s. 56(1) and 56(2) of the Act is as follows:

(i) The property is frozen or seized pursuant to the Act;

(ii) There is no prosecution for an offence under s. 4(1) of the Act;

(iii) Before expiration of 12 months from the date of freeze or seizure, learned DPP may apply to this court for an order of forfeiture provided that if he/she is satisfied that such property had been obtained as a result of or in connection with s. 4(1) offence.

(iv) Upon a proper application made to the judge by the applicant, the judge shall make a forfeiture order if he is satisfied that, on the balance of probabilities that the property is the subject matter of the offence under s. 4(1) of the Act and there is no purchaser in good faith for valuable consideration in respect of the property.

[12] Therefore it follows that the court's function under this Act is not merely Ministerial or Executive character. The duty of the court is to be satisfied that on the balance of probabilities that the property is subject matter of the offence under s. 4(1) of the Act.

A This is a justiciable issue and ought to be resolved based on the evidence adduced by the applicant. This court has the determinative role in the process of evaluating learned DPP's application for the making of the forfeiture order. It is my considered view that, it must be evaluated objectively to see
B whether the case is one where it is reasonable and proper to make the orders sought.

Issues

C **[13]** Learned counsel argued that s. 56 of the Act is inconsistent with art. 13 of the Federal Constitution and therefore by virtue of art. 4(1) of the Federal Constitution it is *void*. Learned DPP countered his argument by submitting that what was required for the legislation in question to be constitutional, was for it to have
D been validly passed by the Parliament. Hence the validity of any duly enacted piece of legislation could not be questioned on grounds of reasonableness, no matter how subjective or arbitrary the law appeared to be. On this issue, I do not find any force in the submission made by learned counsel for the respondents; and I find merit in the submission made by learned DPP. The decision
E of the Federal Court in the case of *Arumugam Pillai v. Government of Malaysia* [1975] 1 LNS 2, clarified the correct position of the law that:

> Whenever a competent Legislature enacts a law in the exercise of
F any of its legislative power, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking Article 13(1) of the Constitution; however arbitrary the law might palpably be.

G **[14]** Learned DPP submitted the following issues:

(i) that the investigations carried out by the Chief Inspector Muhamad Nazif on the 1st to 5th respondents, he found that the monies in the bank accounts belonging to them were proceeds of illegal public lottery;

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(ii) the 4th respondent had used the proceeds of unlawful activity, namely, illegal public lottery to acquire the vehicles;

(iii) that the respondents have failed to show the cause why the properties seized should not be forfeited. The burden of proof
I is on the 2nd to 5th respondents to show that the properties shall not be forfeited;

(iv) the respondents have failed to testify on the balance of probabilities that the court can properly release the properties seized to them; and

(v) that the supplementary affidavits are admissible, notwithstanding objection by the respondents.

[15] Learned counsel for the respondents submitted as follows:

(i) No criminal charge under predicate offence. There is no prosecution under the Act. Learned DPP should not automatically resort to this s. 56 of the Act merely on the ground of the suspicious circumstances of the police without credible evidence to support the allegations.

(ii) The seizure and freeze of the property is illegal, irrational and procedural impropriety. Whenever the freezing order is given for bank accounts, the s. 44(1) triggers. The freezing order made by the enforcement agency cease to have effect after ninety days from the date of the order; if the person against whom the order was made had not been charged with an offence under this Act (s. 44(5)) of the Act. The freezing order in this case was given on 6 July 2010.

(iii) Failed to satisfy this court that the property is the proceeds of unlawful activity.

(iv) The applicant cannot ask the court to issue notice under s. 61 of the Act without satisfying the forfeiture order against the respondents.

(v) Learned DPP relied in his affidavit that all the respondents obtained the properties from the unlawful activity of s. 4A(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969, which is not a serious offence.

Decisions of this Court

[16] Section 56 of the Act, on which the forfeiture application is based and which falls under part (vi) of the Act provides (insofar as it is relevant to the present enquiry) that the:

> High Court Judge shall ... make an order for the forfeiture if the judge is satisfied on a balance of probabilities that the property concerned ... Is the subject matter of an offence referred in the second schedule.

[17] Thus the focus at this stage is not so much on the question whether or not the respondents' version is true or not. The focus is not on the wrongdoer, but on property that has been used to commit an offence or which constitutes the proceeds of crime. Therefore, for the present application the guilt or wrong doings of the owner of property is not primarily relevant to the proceedings.

[18] In deciding whether or not learned DPP has discharged the onus resting upon him in the present case, the following issues have to be considered in turn:

(a) On which offence(s) does the application rely?

(b) Are those offence(s) referred to in the Second Schedule to the Act?

(c) Is the property sought to be forfeited a subject matter of the serious offence, as contemplated by the Act?

(d) Is there sufficient evidence as to the issue (c)?

Which Offence Does The Applicant Rely?

[19] The applicant's notice of motion was supported by the founding affidavit of learned DPP (encl. 3) which he relied for purposes of the present application for forfeiture order expressly and clearly affirmed as follows:

(i) Paragraph 38 of his affidavit states:

> (b) Siasatan terhadap responden pertama dan reponden kedua di bawah sub-s. 4A(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 telah dijalankan oleh Pegawai Penyiasat Polis DiRaja Malaysia Cif Inspektor Polis Muhamad Nazif bin Wahab.
>
> (c) Saya pohon untuk merujuk kepada perenggan 3,4,5,6,7,8,9,10,11,12,13,14,15,16 &17 affidavit Cif Inspektor Muhamad Nazif mengenai kesalahan yang dilakukan di bawah sub-s. 4A(1) Ordinan Darurat (Ketenteraman Awam Dan Mencegah Jenayah) 1969.
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> (f) Siasatan yang dijalankan menunjukkan bahawa responden pertama, reponden kedua, responden ketiga, responden keempat dan responden kelima telah memperolehi harta-harta alih tersebut hasil daripada aktiviti haram iaitu kesalahan di bawah sub-s. 4A(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969.

(ii) Paragraph 37 relates another offence as follows: A

> Hasil daripada siasatan yang dijalankan saya berpuas hati bahawa harta yang disita di perenggan 6, 7, 8, 9, 10, 11, 12, 13, 14, 28, 31 dan 34 di atas adalah hata-harta alih dan takalih berkaitan dengan suatu kesalahan di bawah sub-s. 4(1) AMLATFA 2001. B

[20] As rightly pointed out by learned counsel for the respondents that it is not quite clear from the affidavit of learned DPP on which offence(s) the applicant relies for purposes of this forfeiture application. It must be pointed out that the forfeiture application is a serious matter and the owner stands to lose C property because the property was the subject matter of the offence of s. 4(1) of the Act, it demands that the applicant to set out clearly the case he or she is called to answer. It is my finding of fact that there is no satisfactory proof from the applicant which offence they are relying on for the purpose of forfeiture D application.

Are Those Offences Referred To In The Second Schedule?

[21] The next question to consider is whether the offences mentioned above fall within the Second Schedule of the Act? The E illegal public lottery is within the ambit of the Second Schedule but s. 4A(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969 is not a serious offence as spelt out in the Second Schedule. This again is the second flaw that I found on the applicant's application. Is the property subject matter of F serious offence?

[22] The properties which were claimed by learned DPP as proceeds of unlawful activity of s. 4A(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969 are not a subject matter G of serious offence. There is no sufficient evidence to link the crime committed and the property. The burden is on the applicant to satisfy the court that the property is the subject matter of the offence under s. 4(1) of the Act. Learned counsel for the respondents invited my attention to the decision rendered in H *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705, p. 710, His Lordship Gopal Sri Ram FCJ said:

> And where that evidence is by way of affidavit the court is not I spared the task of subjecting its contents to the same tests as in any other case, if not to stricter scrutiny since the case concerns

A the violation of a constitutionally guaranteed protection. One of the tests that a court applies to test allegations in affidavits is to see whether they are contradictory in nature. See, *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18. Further, where a party upon the onus of proof lies adduces conflicting or contradictory evidence, a court assessing that evidence is in the usual way entitled to rule that the burden has not been discharged. And in a matter as important as individual liberty, where contradictory averments are made on oath, the detenu is entitled to rely on the version that is most favourable to him. Put a little differently, where as in circumstances present here, more than one inference may be drawn from the evidence presented by the detaining authority, the inference most favourable to the detenu must be drawn.

[23] Applying the principles I had referred to earlier, it is my considered view that the applicant's application cannot succeed.

Supplementary Affidavits

[24] In deciding whether the supplementary affidavits can be accepted at such a late stage of the proceedings after closing the case and finished the submission, I heavily relied on the decision of the Supreme Court in the case of *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi* [1994] 4 CLJ 47, where it was held para. 55:

> It follows that the principle against any attempt to adduce additional affidavit evidence especially after the aggrieved party has closed its cases in case affecting the liberty of the subject, must be applied with even greater vigilance by the trial court.

[25] Therefore the filing of the supplementary affidavits by the applicant without obtaining leave of the court and also for the reasons mentioned above is not allowed.

Conclusion

[26] Based on the evidence adduced by learned DPP, I am of the opinion that the evidence adduced is insufficient to satisfy me that the properties are the subject matter of or was used in the commission of an offence under sub-s. 4(1) of the Act. As such the application for the forfeiture order against all the

respondents are dismissed. As such, notice under s. 61 of the Act is premature. Section 61 only comes into play when the court makes the order of forfeiture under s. 56 of the Act.

[27] Therefore the application for forfeiture is dismissed and all the properties must be released immediately to the respondents respectively.